No. 296

FILED
SEP 6 1940
CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

UNITED STATES OF AMERICA, *Petitioner,*

against

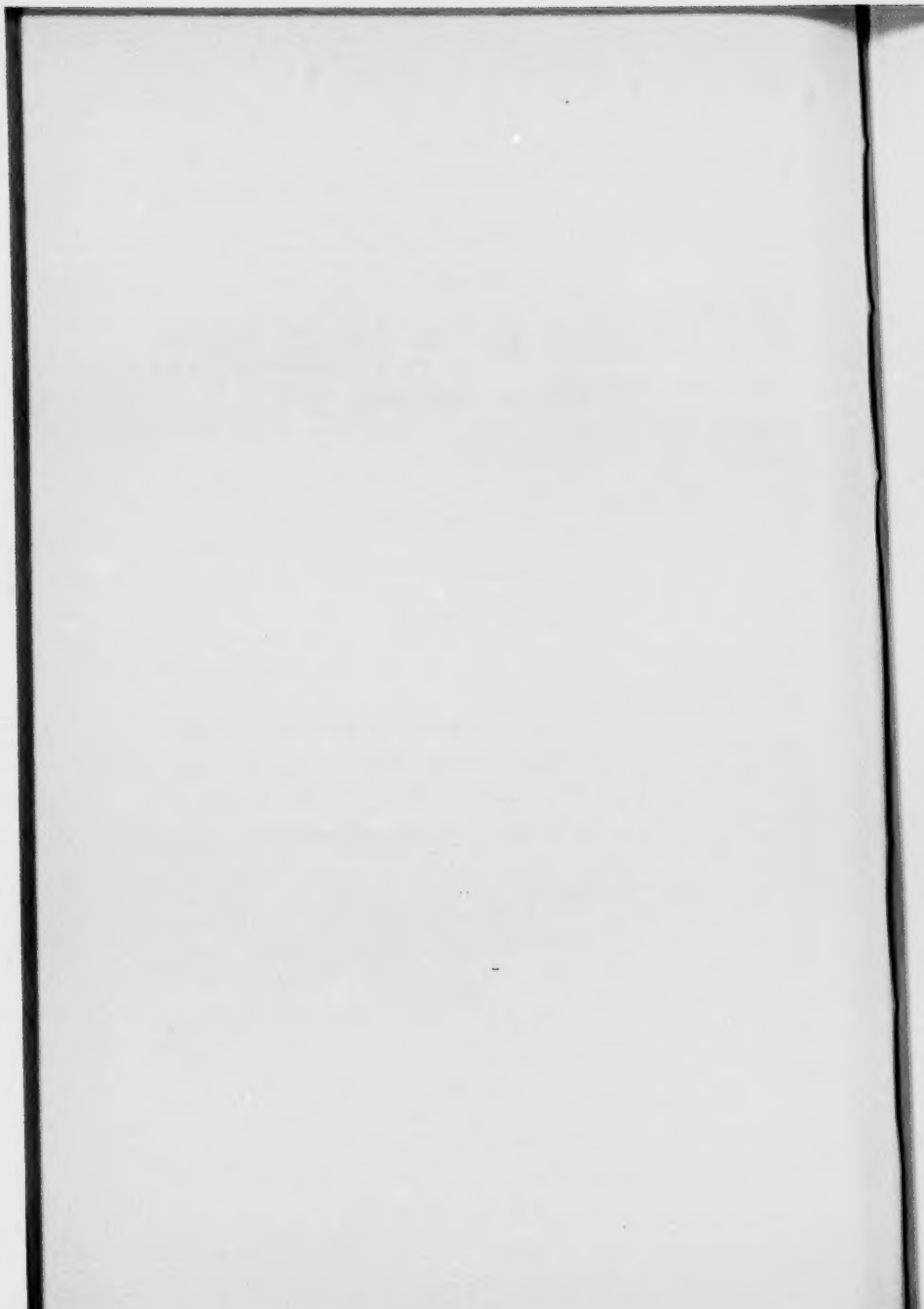
THOMAS J. FALLON, *Respondent.*

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

LITTLETON & LEVY,
Attorneys for Respondent,
149 Broadway,
Borough of Manhattan,
New York City, N. Y.

MYLES A. WALSH,
Of Counsel.

Appeal Printing Co., Inc., 130 Cedar St., New York - WOrth 2-3242



INDEX

PAGE

STATEMENT OF FACTS 2

POINT I—The decision sought to be reviewed herein is in conformity with principles of law established by this Court 4

POINT II—Respondent's telephone communications to Reilly were "intercepted", within the meaning of Section 605 of the Federal Communications Act 6

POINT III—The petition for a writ of certiorari herein should be denied 8

Table of Cases Cited

Nardone *v.* U. S., 302 U. S. 379 ..... 4, 5

Nardone *v.* U. S., 308 U. S. 338 4

United States *v.* Fallon, 112 Fed. 2nd 894 2

United States *v.* Polakoff, 112 Fed. 2nd 888 ..... 2, 5

Weiss *v.* U. S., 308 U. S. 321 4

Statutes Cited

Federal Communications Act, Section 605 ..... 1, 4, 6

U. S. Code, Section 231, Title 18 1

No. 296

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

UNITED STATES OF AMERICA,
Petitioner,

against

THOMAS J. FALLON,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Thomas J. Fallon, the respondent above named, was convicted of the crime of Perjury (Section 231, Title 18, U. S. Code) after a trial before a District Judge and jury in the United States District Court for the Southern District of New York. Thereafter, the Circuit Court of Appeals for the Second Circuit reversed the conviction and ordered a new trial, upon the ground that the trial court had improperly admitted in evidence phonographic recordings and typewritten transcripts of certain telephone communications transmitted by respondent and intercepted by agents of the Federal Bureau of Investigation, in violation of Section 605 of the Federal Com-

munications Act. (*United States* v. *Fallon,* 112 Fed. 2nd 894.) Simultaneously with the reversal of respondent's conviction, the Circuit Court reversed another conviction upon similar grounds. (*United States* v. *Polakoff,* 112 Fed. 2nd 888.)

Statement of Facts

On or about February 7th, 1939, a Grand Jury was impanelled in the United States District Court for the Southern District of New York, to investigate charges of alleged misconduct on the part of Martin T. Manton, former Chief Judge of the Circuit Court of Appeals for the Second Circuit. Among the matters being investigated was a charge that one Alfred F. Reilly had paid certain moneys to Judge Manton for the purpose of influencing his judicial action in a matter pending before him, in which matter Reilly was financially interested. The moneys were allegedly collected for Judge Manton by William J. Fallon, a brother of the respondent (R. 14).

Shortly after the Grand Jury commenced its investigation, Reilly confessed his improper dealings with Judge Manton to the prosecuting authorities. Thereupon, one Darold B. Hickman, a special agent of the Federal Bureau of Investigation, was detailed to accompany Reilly to his home in North Attleboro, Massachusetts (R. 34). While Reilly was absent from his home, respondent telephoned from New York and left a message for Reilly to call him back. Accordingly, upon Reilly's arrival home with Hickman, on March 6th, 1939, Reilly telephoned respondent in New York and Hickman "listened in" to the conversation upon an extension telephone. During the conversation Reilly informed respondent that he would telephone him again the following day (R. 36).

On the next day, March 7th, 1939, a mechanical wire-tapping device known as a "Presto Recording Unit" was "tapped in" to the telephone wires in the basement of Reilly's home, for the purpose of intercepting and recording the conversation which was to take place between Reilly and the respondent. The machine was installed with Reilly's knowledge, by James W. Ransom, another agent of the Federal Bureau of Investigation (R. 36). After the machine had been installed, Reilly telephoned respondent, and the conversation between them was intercepted and recorded (R. 36). On the following day, March 8th, 1939, Reilly again telephoned respondent from a summer camp at Taunton, Massachusetts, to which the wire-tapping apparatus had been moved in the meantime. This conversation, also, was intercepted and recorded by federal agents Hickman and Ransom (R. 39).

About one week later—on March 14th, 1939—respondent was called before the so-called Manton Grand Jury. He appeared again before the same Grand Jury on March 30th, 1939. On both occasions, in response to questions propounded by the District Attorney, respondent denied having previously discussed the pending investigation with Reilly. He also denied having advised Reilly to destroy certain records pertaining to the investigation (see Grand Jury testimony, Government's Exhibits 6 and 7). On the basis of these denials respondent was subsequently indicted for perjury (see Indictment, R. 3).

Upon the trial of the indictment, the Government sought to establish the falsity of respondent's Grand Jury testimony by introducing in evidence phonographic records and typewritten transcripts of the statements made by him during his telephone conversations with Reilly on March 7th and March 8th, 1939. Respondent objected to

the introduction of these records upon the ground that they had been obtained by intercepting his communications without his consent, in violation of Section 605 of the Federal Communications Act. The records were, nevertheless, admitted in evidence upon the theory that Reilly's consent to the installation of the wire-tapping machine rendered the records admissible in evidence against the respondent (R. 97).

POINT I

The decision sought to be reviewed herein is in conformity with principles of law established by this Court.

The recent decisions of this Court in the *Nardone* and *Weiss* cases* have dispelled all doubt upon the question of the admissibility of evidence obtained by wire-tapping. It is now firmly established that Section 605 of the Federal Communications Act prohibits the unauthorized interception of telephone communications by federal officers engaged in the investigation and prosecution of crime, and that evidence directly or indirectly obtained by such means may not be admitted against a defendant in a federal prosecution.

In the case at bar, it is not claimed that respondent authorized the interception or divulgence of the messages transmitted by him to Reilly. It is contended, however, that he lost his privilege against interception and divulgence by virtue of the fact that Reilly, who initiated the calls in question, consented to the installation of the wire-

---

* *Nardone* v. *U. S.*, 302 U. S. 379.
Weiss v. *U. S.*, 308 U. S. 321.
Nardone v. *U. S.*, 308 U. S. 338.

tapping machine by means of which the communications were intercepted and recorded. The fallacy of that contention is aptly demonstrated by Judge Learned Hand in the prevailing Opinion in the *Polakoff* case (112 Fed. 2nd 888, 889), as follows:

> "Every telephone talk, like any other talk, is antiphonal; each party is alternately sender and receiver and it would deny all significance to the privilege created by Section 605 to hold that because one party initiated the call he had power to surrender the other's privilege."

The soundness of this ruling cannot be successfully challenged. To hold that one party to a telephone call—regardless of whether he initiates or receives it—has power to authorize interception against the other party, would not only destroy the privilege created by the statute, but would afford investigating officers a means of circumventing the rule established by this Court and provide them with a method of continuing the very practice which it condemned.

On the first appeal in the *Nardone* case (302 U. S. 379) Mr. Justice Roberts pointed out that the practice of intercepting telephone communications is "inconsistent with ethical standards and destructive of personal liberty". Obviously, as to the person against whom it is directed, the interception is equally unethical and destructive of personal liberty, whether effected with or without the consent of the other participant in the conversation. True, under the statute, either party may waive his privilege against interception and divulgence. But nothing short of an express waiver by the "sender" himself can authorize interception or divulgence of his communication, or justify its admission in evidence against him in a criminal proceeding.

It is not necessary to comment upon the suggestion that the effect of the ruling in this case will be to afford those engaged in criminal activities immunity from prosecution. Similar arguments were advanced in the *Nardone* and *Weiss* cases, and each successive attempt to legalize wire-tapping upon that basis has been properly rejected. It is to be hoped that this Court will not recede from its courageous attitude and that it will likewise reject the present attempt.

POINT II

Respondent's telephone communications to Reilly were "intercepted", within the meaning of Section 605 of the Federal Communications Act.

Upon this application, the Government adopts a wholly inconsistent position. It contends first, that the records introduced in evidence were admissible upon the theory that the interception was "authorized by the sender", within the meaning of the statute. It then contends that no "interception" whatsoever took place, by virtue of the fact that the messages were not deflected from their course and ultimately reached their intended destination. That theory is fallacious to the point of absurdity.

As pointed out by Judge Learned Hand in the *Polakoff* case, "Anyone intercepts a message to whose intervention as a listener the communicants do not consent; the means he employs can have no importance; it is the breach of privacy that counts."

The proof is uncontradicted that Hickman and Ransom, the Government agents, tapped into the telephone wires by means of a mechanical device, and recorded respond-

ent's messages as they were transmitted through the machine. True, the messages reached their intended destination. But they were intercepted and recorded in the course of transmission, between the point of origin and the point of destination. To hold that this did not constitute an "interception", within the meaning of the statute, would render the statute meaningless and wholly ineffectual to accomplish the purpose for which it was enacted.

To demonstrate the unsoundness of the Government's theory, it is sufficient to point out that in the *Nardone* and *Weiss* cases, as in the case at bar, the messages were not deflected from their course and ultimately reached their intended destination, albeit none of the participants in the conversations knew that their messages were being intercepted and recorded. Obviously, the fact that one of the participants has knowledge of the interception does not alter the character of the "interception".

Moreover, the question involved in this case is not whether evidence obtained by attaching a recording apparatus to an "*extension line*" is admissible, as asserted on page 2 of the Petition herein. Respondent does not concede that it makes any difference where the recording apparatus is attached—whether to an extension line or to the main wire. The fact remains, however, that in the case at bar, as distinguished from the *Polakoff* case, the apparatus was attached to the telephone wires in the main circuit and not to any "*extension line*". The proof shows that during the first conversation between respondent and Reilly the apparatus was attached to the wires in the basement of Reilly's home (R. 36). During the second conversation it was attached to the wires in the kitchen of his summer camp (R. 39). In both instances the wire

tapping was accomplished in the usual manner and the voices were recorded *before* they reached their intended destination.

It is absurd to argue that the ruling in this case would prevent an employer from having his employee listen in to his conversation on an extension telephone. That question is not even involved in this case and the only question presented for determination is whether investigating or prosecuting officers may intercept telephone communications for the purpose of obtaining incriminating evidence. That question was fully answered by this Court in the *Nardone* and *Weiss* cases, and is no longer open to controversy.

POINT III

The petition for a writ of certiorari herein should be denied.

Respectfully submitted,

LITTLETON & LEVY,
Attorneys for Respondent,
Office & P. O. Address,
149 Broadway,
Borough of Manhattan,
New York City, N. Y.

MYLES A. WALSH,
Of Counsel.